United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

983

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,969

PAUL LEACH

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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February 1, 1971

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ses chiefly relied upon are marked by asterisks

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2. Was appellant denied his Sixth Amendment right to counsel where there was no suppression of the in-court identification of appellant by Diane Lucas because of her previous photographic identification of him on October 13, 1969?

3. Was appellant denied his Fifth Amendment right to due process of law by the in-court identification of appellant by Diane Lucas and Vickie Simms because of their previous photographic identification of him on July 31, 1968?

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6. Was appellant denied a fair trial when the court below denied defendant's motion for mistrial?

7. Does the inadequacy of the instruction on armed robbery and assault with a dangerous weapon, which failed to alert the jury to the fact that the only dangerous weapon appellant was charged with using was a pistol, require a new trial?

This case has not previously been before this Court

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JURISDICTIONAL STATEMENT

This is an appeal from a conviction for robbery and related offenses. The District Court had jurisdiction under Title 22, Section 2401 of the District of Columbia Code. This Court has jurisdiction of the appeal under Title 28, Section 1291 of the United States Code.

STATEMENT OF CASE

Around 7:00 P.M. on June 8, 1968, a robbery occurred at a five and ten cent store in Washington, D. C. Two teen-age girls, the manager, and the manager's wife were in the store. Two masked men entered the store, with a shotgun and a pistol, and told everyone to get on the floor.

A special policeman testified that he saw the two masked men leave the store but he was unable to identify them (Tr. 238-243). Another witness heard several shots and saw two men running from the shopping area (Tr. 243). After a chase, one of the masked men was apprehended, returned to the scene, was identified, and during the trial pleaded guilty.

Appellant's photograph was identified by the two teenage girls during July 1968.

An eight-count indictment filed August 19, 1968 charged appellant with armed robbery, robbery, assault with a dangerous weapon, and related offenses. A bench warrant was issued August 30, 1968. Appellant was arrested October 17, 1968, and has been incarcerated since that date. Arraignment took place November 15, 1968, and counsel was appointed November 25, 1968. Trial commenced October 13, 1969.

At no time did appellant request any delay. Indeed, appellant was ready to proceed at all times.

The court below refused to dismiss for lack of a speedy trial (H. Tr. 12). The government's only explanation of the long delay was the court's docket.

The court below refused to suppress identification testimony. During the noon recess the prosecutor showed photographs to one of the teen-age girls but he did so out of the presence of defense counsel, who were in the court house.

The court below admitted into evidence a shotgun which the indictment did not charge was in appellant's possession, wearing apparel connected only with the co-defendant, and shotgun shells and traffic tickets found during an allegedly illegal search.

The court below refused to grant a mistrial when the co-defendant pleaded guilty (Tr. 212).

All counts of the indictment referring to a weapon add the words "that is, a pistol." The court below refused appellant's request that it include after its reference to a "dangerous weapon" the words "that is, a pistol." Instead, the court used "dangerous weapon" without modification.

Motion for judgment of acquittal was made at the conclusion of the Government's case (Tr. 371-373). Motion for judgment of acquittal was made at the conclusion of all the evidence (Tr. 458-459). Both motions were denied.

STATEMENT OF POINTS

1. The court below erred in denying appellant's motion that the indictment be dismissed for want of a speedy trial. H.Tr. 6-12.

2. The court below erred in not suppressing identification testimony based on the prosecution's display of appellant's photograph in the absence of his court-appointed counsel.

3. The court below erred in not suppressing the in-court identification of appellant because of circumstances so suggestive as to give use to likelihood of irreparable mis-identification.

4. The court below erred in denying appellant's motion for mistrial after a co-defendant pleaded guilty during the trial. Tr. 212-213, 221-222.

5. The court below erred in admitting into evidence (a) a shotgun which the indictment did not charge was in appellant's possession, (b) wearing apparel connected only with a co-defendant, and (c) shotgun shells and traffic tickets found as a result of an illegal search.

6. The court below erred in denying appellant's motion for mistrial during the cross-examination of Margie Leach. Tr. 411-412.

7. The court below erred in giving its instructions on armed robbery and assault with a dangerous weapon, because it failed to instruct the jury that a pistol was the only dangerous weapon appellant was charged with using.

REFERENCES TO RULINGS

[Rule 8(e)]

1. Denial of appellant's Motion to Dismiss the indictment for want of a speedy trial. (Hearing Trial Court Reporter's transcript pages 6-12).

2. Denial of Motion to Suppress In-Court Identification of Appellant by Diane Lucas because of her previous photographic identification of him on October 13, 1969. (Hearing Trial Court Reporter's transcript pages 129-131).

3. Denial of Motion to Suppress In-Court Identification of appellant by Diane Lucas and Vickie Simms because of their previous photographic identification of him on October 13, 1969. (Hearing Trial Court Reporter's transcript pages 129-137).

4. Denial of Motion for Mistrial after co-defendant pleaded guilty. (Trial Court Reporter's transcript pages 212-213, 221-222).

5. Denial of Motions to Suppress Various Items of Evidence. (Trial Court Reporter's transcript pages 215-222, 365-369).

6. Denial of Motion for Mistrial during cross-examination of Margie Leach. (Trial Court Reporter's transcript pages 411-412).

7. Denial of Defendant's objections to Court's instructions on armed robbery and assault with a dangerous weopon. (Trial Court Reporter's transcript pages 497-502, 525-529, 530-533).

SUMMARY OF ARGUMENT

1. The elapsed time between appellant's indictment and trial was approximately fourteen months; between appellant's arrest and trial, approximately twelve months. Appellant has been incarcerated continuously since his arrest. Bail had been set at Ten Thousand Dollars but appellant was unable to take advantage of bail. Various moves for release on personal recognizance were unsuccessful. Appellant was in no way responsible for a single hour of this delay. Appellant was prejudiced by the delay because his principal witnesses were two elderly relatives who testified that he was in Buffalo, New York, on the date of the robbery. Their testimony was challenged by the prosecution on the ground that there was considerable basis for suspicion as to the accuracy of their recollection, because of the time which had elapsed between June 8, 1968, and the date of trial. Thus, the very delay, for which appellant was not responsible, was used to cast doubt on his witnesses' recollections. Had the trial been held within a reasonable time after appellant's arrest, the testimony of appellant's alibi witnesses would not have been considered so suspect. The long delay was of such character as to constitute a denial of appellant's Sixth Amendment guarantee of a speedy trial.

2. Appellant had been indicted, arrested, was in custody, and was represented by court-appointed counsel. A pretrial hearing was held to determine whether certain eyewitness testimony should be

suppressed because of earlier photographic identification. During the lunch time recess the prosecution displayed the photograph to one of the witnesses who had not yet testified at the hearing. Defense counsel were neither notified nor present at the display. The witness subsequently admitted she had been shown the defendant's photograph that very day outside the courtroom and she admitted she could not look at defendant without thinking of his photograph. Appellant was denied counsel.

3. On the day of the robbery, the police discovered an automobile near the scene of the crime. The police determined it was owned by appellant, they obtained appellant's photograph; they then arranged a photographic line-up in which only the appellant was a suspect. Inasmuch as the investigation had "focused" on appellant, the photographic identification on that date was a critical stage in the proceedings requiring presence of counsel. Further, the photographic line-up was impermissibly suggestive.

4. Appellant's co-defendant plead guilty during the course of the trial. The lower court denied appellant's motion for mistrial, relying on Scott v. United States. Instead, a cautionary instruction was given by the lower court. Scott can be distinguished because here the co-defendant was absent from the trial following a critical in-court identification but before cross-examination.

5. The lower court erred in allowing a shotgun into evidence when appellant was charged with causing a crime "with a dangerous weapon, that is, a pistol." The lower court also erred in allowing into evidence items of wearing apparel connected only with the co-defendant who plead guilty. Finally, the lower court erred in allowing into evidence shotgun shells and traffic tickets obtained from an illegal search.

6. During cross-examination of appellant's sister, she admitted she had learned that appellant's automobile was involved in the police investigation. In an attempt to impeach her, the prosecution asked her if she had sought out one Detective Burwell, who was in the courtroom and who was asked to stand. The jury knew Detective Burwell was responsible for the investigation of the robbery but there was no reason the witness should have known this. This was prejudicial.

7. Defendant was entitled to a clear instruction on each element of each defense, in logical sequence. The court below failed to give such instructions because it referred only to "dangerous weapon" rather than to the language of the indictment, which was "dangerous weapon, that is, a pistol." Thus, the court below failed to direct the jury's attention to the fact that the only dangerous weapon charged to appellant was a pistol.

ARGUMENT

I

APPELLANT HAS BEEN DENIED A SPEEDY TRIAL

As set forth in detail in appellant's oral motion for dismissal presented to the court at the calendar call on October 1, 1969, and as renewed in writing on the date set for trial, October 13, 1969, the incidents upon which appellant's conviction is based occurred on June 8, 1968, when a variety store was robbed. Several weeks after the robbery, on July 31, 1968, appellant's picture was identified by two alleged eye witnesses -- Diane Lucas and Vickie Simms, both of whom were teenagers. Appellant was thereafter indicted in August, 1968, and was arrested on a bench warrant on October 17, 1968. Appellant has been incarcerated since October 17, 1968. But, he was not arraigned until November 15, 1968; counsel was not appointed until November 25, 1968; and the first and only trial date set for defendant was October 13, 1969.

Appellant was in no way responsible for the year's delay. The only motions filed on his behalf -- other than those requesting review of the conditions of pretrial release -- were filed on December 20, 1968. Orders disposing of two of these motions were entered on January 10, 1969. Disposition of the third -- a motion to suppress identification testimony -- was withheld in accordance with normal court prodecure until the case had been assigned for trial.

The prejudice to defendant's person, as a result of the protracted pretrial incarceration, was enough to require dismissal of the indictment. McNeill v. United States, ____U.S. App. D.C. ____, No. 21,570 D.C. Cir., June 4, 1968. But, appellant did not merely suffer prejudice to his person; he suffered prejudice to his ability to defend himself as well. By the time the case came to trial, sixteen months had elapsed since the alleged offense and approximately fifteen months had elapsed since the photographic identification. The delay worked against defendant in at least the following two ways:

a. As a result of the delay there was an enhanced likelihood of misidentification or undue reliance on the photographic identification by the alleged eye witnesses. Nevertheless, because the two witnesses who had seen appellant's photograph, and who recalled the photograph, were able to point to appellant in the courtroom, there was a tendency for the jury to believe their testimony that appellant was in fact one of the perpetrators of the crime.

b. On the other hand, appellant's principal witnesses were two elderly relatives who testified that he was in Buffalo, New York, on the date of the robbery. Their testimony was challenged by the prosecution on the ground that there was considerable basis for suspicion as to the

> accuracy of their recollection, because of the time which had elapsed between June 8, 1968, and the date of trial. Thus, the very delay, for which appellant was not responsible, was used to cast doubt on his witnesses' recollections. Had the trial been held within a reasonable time after appellant's arrest, the testimony of appellant's alibi witnesses would not have been considered so suspect.

Because of this showing of a reasonable likelihood that there was prejudice to the defense, and because of the inability of the prosecution to show there was no prejudice to the defense, the lower court should have granted this motion and ordered the indictment dismissed. See Smith v. United States, 135 U.S. App. D.C. 284, 418 F.2d 1120 (1969).

The backlog of criminal cases in this jurisdiction is so large that it could undermine confidence in the judicial process. An argument can be made that this Court should hold that the Sixth Amendment requires that each criminal case be tried within a fixed period of time after arrest. Perhaps the recently-announced rule of the United States Court of Appeals for the Second Circuit, that of a six-month period, should be adopted in the District of Columbia.

II

THE IDENTIFICATION TESTIMONY OF DIANE LUCAS SHOULD HAVE BEEN SUPPRESSED BECAUSE APPELLANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN, AFTER HE HAD BEEN INDICTED, WAS IN CUSTODY, AND WAS REPRESENTED BY COUNSEL, THE PROSECUTION DISPLAYED HIS PHOTOGRAPH TO DIANE LUCAS FOR IDENTIFICATION PURPOSES WITHOUT GIVING APPELLANT'S COUNSEL NOTICE AND AN OPPORTUNITY TO BE PRESENT

A pretrial hearing was held by the Court on October 13, 1969, to determine whether certain eye witness testimony should be suppressed in light of photographic identification which had previously taken place on July 31, 1968. At appellant's request appellant was not present in the courtroom so that there might be a full exploration of the circumstances of the July 31, 1968, identification, without the prejudice that might result if the witness could observe appellant while testifying. During the lunch time recess on October 13, 1969, the prosecution displayed the photographs in issue to one of the witnesses -- Diane Lucas -- who had not yet testified at the hearing. (H. Tr. 98). Although counsel for appellant could easily have been notified concerning the photographic display -- he was in court for the purpose of examining Miss Lucas about her identification of appellant's photograph -- no such notification was given. Subsequently, at the hearing the witness admitted that she had been shown appellant's photograph that very day outside the courtroom. (H. Tr. 98). At trial she admitted that she could not look at appellant without thinking of his photograph. (Tr. 236).

The opinion in Wade makes it clear that a post-arrest, post-indictment identification procedure is a "critical stage" at which counsel is entitled to be present when the procedure (1) might result in prejudice to the defendant's rights which (2) cannot be discovered and vitiated at trial.

With regard to the first factor, photographic identifications are in fact line-ups -- but of pictures rather than of the people themselves. Any false identification made as a result of an erroneous photographic identification may well result in a later false corporeal identification at trial. As Wall says:

> ". . .where a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party, but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say, 'That's the man that did it,' what me may actually mean is, 'That's the man whose photograph I identified.'" (Footnote omitted). Wall, Eye-witness Identification in Criminal Cases 68.

As with the line-up situation, if counsel is present at a photographic identification he can ensure that the identification procedure is conducted as fairly as possible, or if not, that any improprieties are exposed at a later time. Counsel can at the very least be a witness who can protect his client against possibly inaccurate accounts of what occurred.

When a suspect is in custody and represented by counsel, the display of his photograph to witnesses for identification purposes is a "critical stage" of the prosecution requiring notice and an opportunity for counsel to be present. United States v. Wade, 388 U.S. 218 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963). In this case the prosecution violated appellant's right to counsel by showing his photograph to witnesses for identification without giving his counsel notice and an opportunity to be present. This claim was raised below (H. Tr. 128-135). However, even if it were not this clear violation of the appellant's right to counsel is evident on the face of the record and should be noticed as plain error. See White v. Maryland, 373 U.S. 59, 60 (1963) and Rule 52(b), F.R.Crim. P.

The principle that a suspect, in custody and represented by counsel, is constitutionally entitled to have his counsel present at any photographic identification clearly follows from recent Supreme Court decisions holding that the right to counsel is applicable to a number of post-arrest, pretrial investigation procedures. In Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), the Court determined that custodial interrogation -- that interrogation which occurs after the police have begun to focus on a particular suspect -- is a "critical stage." See also Massiah v. United States, 377 U.S. 201 (1964). In United States v. Wade, supra, and Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court held that a post-indictment, post-arrest identification at a line-up of an

accused is a critical stage of the prosecution at which the accused is entitled to be represented by counsel. In Thompson v. Nevada, 451 P.2d 704 (Nev.), cert. denied, 396 U.S. 893 (1969), the court recognized the need for counsel at photographic identifications. The Court of Appeals for this Circuit in Clemens v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) and in Hamilton v. United States, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969), has recognized that the Wade and Gilbert rationale applies, in appropriate cases, to photographic identifications. United States v. Kirby, No. 23,106, D.C. Cir., 427 F.2d 610 (1970), where the defendant had not yet been arrested and no lawyer had been appointed, can be distinguished.

The Supreme Court noted in Wade and Gilbert that in any confrontation between the suspect and witnesses the police could employ a variety of inherently unfair or suggestive techniques which might lead to false identification. Such a false identification would deprive a defendant of his constitutional right to a fair trial. As the Court pointed out, it is difficult to penetrate the wall of secrecy surrounding a line-up or an interrogation to determine whether proper procedures were used. The Court stated that the inability to determine by cross-examination what actually occurred at a line-up or interrogation might result in a violation of the defendant's constitutional right to confront and cross-examine the witnesses who testify against him. United States v. Wade, supra, 388 U.S. at 235.

A second factor critical to the decisions in Escobedo, Miranda, Wade and Gilbert was that if counsel were not present at identification procedures any improper procedure employed might go undetected at trial. The Court pointed out in Wade, as in Escobedo and Miranda, how extremely difficult it is to determine what actually occurs at line-ups and interrogations.

Photographic identification presents an extreme example of an identification procedure which is hidden from the scrutiny of defense counsel. Whereas in the line-up or interrogation situation the accused can relate to his counsel his recollection of the procedure followed, when neither the accused himself nor his counsel is present at a photographic display, neither has any information regarding the manner in which the identification was conducted. When a photographic identification is made, the defendant's counsel is left to uniformed probing on cross-examination to discover whether there was any prejudice to the defendant's rights.

A holding that a suspect who is in custody is entitled to have his counsel present at any photographic identification would not interfere with efficient police investigation. The police would still be free to make effective use of the "rogues gallery" as part of a general investigation. Just as the police may interrogate people without the presence of counsel as part of a general investigation, so might photographs be used. The right to counsel only arises once the suspect is in custody.

III

THE IDENTIFICATION TESTIMONY OF DIANE LUCAS AND VICKIE SIMMS SHOULD HAVE BEEN SUPPRESSED BECAUSE APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN, AFTER THE POLICE INVESTIGATION HAD FOCUSED UPON HIM, POLICE DISPLAYED HIS PHOTOGRAPH TO DIANE LUCAS AND VICKIE SIMMS WITHOUT COUNSEL FOR APPELLANT BEING PRESENT AND UNDER CIRCUMSTANCES SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

On the date of the robbery, June 8, 1968, the police discovered an automobile near the scene of the crime which they believed was connected with the robbery. The police determined that the car was owned by appellant (H. Tr. 17). They then obtained a photograph of appellant and "carefully" selected photographs of other Negro males to use in a photographic line-up (H. Tr. 18-19). Of the individuals whose photographs were selected, only appellant was suspected of the crime (H. Tr. 25). There was a dispute during the hearing as to which photographs were actually shown. The witness Vickie Simms indicated that the seven photographs which the police furnished the prosecution as being those used in the display were <u>not</u> the only photographs she had seen. But, even if the seven photographs were the ones shown, the photographic display that occurred on July 31, 1968, was legally defective for the following reasons:

A. <u>Appellant's Right to Counsel Was Violated</u>

Although appellant had not yet been indicted or arrested on July 31, 1968, the police investigation had "focused" on him. The

photographic identification on that date was, therefore, a critical stage in the proceedings against him. Escobedo v. Illinois, 378 U.S. 478 (1964). And, the reasoning of the Court in Wade and Gilbert, set forth in Argument II, supra, requiring presence of counsel during identifications which are "critical stages" in the proceeding against an accused, apply equally to the photographic line-up on July 31, 1968.

B. The Photographic Line-up Was Impermissibly Suggestive

In Simmons v. United States, 390 U.S. 377, 383-84 (1968), the Court stated:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. . . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification." (Emphasis supplied)

The present case clearly comes within Simmons. The witness Vickie Simms identified appellant as the robber with a pistol who struck the store manager (Tr. 352, 358) and whose face

she never saw except covered with a mask and sunglasses (H. Tr. 69-70, Tr. 349-50). The witness Diane Lucas identified appellant as the robber with a shotgun who stood in the front of the store (Tr. 189, 224-350) and whose face she saw unmasked only briefly (Tr. 229), before she was aware that a robbery was taking place. Thus, not only did these girls observe the robber under "poor conditions," but they were in direct conflict as to which of the robbers appellant was supposed to have been.

Since the police already had focused on appellant, they knew from his photograph, if they did not know already, that he had a mustache. Nevertheless, of the six other photographs of Negro males which they testified were selected for display purposes only, they chose just one other photograph of a Negro male with a mustache (H. Tr. 26 and 30, Tr. 257, 261). As was brought out at the hearing and at trial, the mustached individual in that photograph closely resembled the co-defendant, who already had been arrested. Detective Burwell testified at the hearing the day prior to the trial that when he selected the photographs for showing to the young girls he knew what the co-defendant looked like (H. Tr. 30, Tr. 265).

At the hearing, Miss Simms stated that she identified pictures of both defendants (H. Tr. 56 and 59).

Miss Lucas testified that she recalled that the robber she was seeking to identify had a mustache (H. Tr. 84). She also testified

that she thought one of the two pictures shown her of a man with a mustache -- the one not of appellant -- looked similar to the co-defendant (H. Tr. 91-92) whom she could identify (H. Tr. 46) and knew had already been arrested (H. Tr. 91-92, 102, 104). The detective told her to pick out one of the men who was there that night (H. Tr. 86-87). Thus, the end result was that a teenage girl, asked by the police some seven weeks after the robbery to look at photographs, selected the only photograph shown to her of an individual with a mustache who did not look like the suspect who had already been arrested.

Miss Simms testified that she did not see a mustache on the robber whom she identified as appellant during the trial. Yet on July 31, 1968, Miss Simms picked out the two photographs shown to her of men with mustaches and said they were both photographs of the man with a pistol (H. Tr. 56). Therefore, she too focused on the characteristic that was emphasized by the careful selection of photographs -- the mustache (H. Tr. 69).

Because the photographic identification was so impermissibly suggestive, and any subsequent identification was colored by the clear picture of appellant that each girl retained in her mind, their identification of appellant at trial should have been suppressed.

IV

THE COURT BELOW SHOULD HAVE ORDERED A MISTRIAL WHEN THE CO-DEFENDANT PLEADED GUILTY DURING THE TRIAL

During the first day of trial, appellant's co-defendant pleaded guilty to robbery out of the presence of the jury. The guilty plea followed in-court identification by two government witnesses -- Jack Pernatin and Diane Lucas. It preceded any cross-examination of Miss Lucas who had also identified appellant prior to the co-defendant's departure from the case. The court below, relying upon Scott v. United States, 135 U.S. App. D.C. 377, 419 F.2d 264 (1969), denied appellant's motion for mistrial. Instead, it gave the jury a cautionary instruction similar to that given by the trial court in Scott.

While the present case is difficult to distinguish from Scott, there are certain significant differences. In Scott it was possible for the jury to speculate, if it was so inclined, that the co-defendant had merely jumped bond since his absence coincided with the "second day" of trial. In the present case, the co-defendant's absence occurred in the course of the first day's proceedings, after he had been identified in court by two eye witnesses. The case then proceeded on the same day against appellant alone. There was, therefore, a much greater risk of jury speculation that the co-defendant pleaded guilty than was the case in Scott.

The most significant difference, however, is that in Scott the Court concluded that even if the jury speculated that the co-defendant had pleaded guilty, the remaining defendant was not prejudiced thereby. This conclusion was based on the following analysis:

> ". . . The theory of his defense was not that there had been no robbery, nor that he and his co-defendant were not present at the scene. His claim rather was that his co-defendant suggested and executed the crime, while he declined the invitation to participate and resolutely looked the other way. Since the co-defendant was by the appellant's own argument guilty, the jury could hardly have been influenced if they did in fact conclude that the former had changed his plea after the first day of trial. . . ."

This analysis, in turn, is buttressed by a similar holding in 419 F.2d at 265, n.1. United States ex rel. Huntt v. Russell, 285 F. Supp. 765 (E.D. Pa. 1968) on similar facts:

> "That is particularly true here. There was no doubt that a theft had occurred and that both Huntt and Weaver were in the car containing the stolen safe. Huntt's theory of defense, according to his counsel, was that Weaver was responsible and that he, Huntt, was in the car without knowledge of what Weaver had done. Weaver's plea was totally consistent with this defense. In any event, the only issue as to Huntt was his participation in the venture." 285 F. Supp. at 765.

In the present case, appellant's theory of defense was not that the co-defendant was guilty. Instead, appellant contended that he (appellant) was in Buffalo, New York, at the time of the offense and that the two teenage girls who identified him (appellant)

as one of the robbers had made an erroneous identification. The jury's speculation that the co-defendant pleaded guilty, following his identification by Miss Lucas, would serve only to buttress Miss Lucas' credibility as an identification witness and incline the jury to believe her identification of appellant. Therefore, appellant, unlike the defendants in Scott or Huntt, would be prejudiced by jury speculation.

It may be argued that even if the jury speculated that the co-defendant had pleaded guilty, there was no more prejudice to appellant than if his co-defendant had remained on trial and the jury had concluded from all the evidence that he was in fact guilty. This argument misses the fundamental distinction between a plea of guilty and a finding of guilty following a trial. A defendant may enter an informed, legally acceptable guilty plea in his "own best interest." Bruce v. United States, 126 U.S. App. D.C. 337, 342 n.17, 379 F.2d 113, 119 n.17 (1967). By entering a guilty plea, the accused does not necessarily "concede the inevitability or correctness of a verdict of guilty were the case tried." McCoy v. United States, 124 U.S. App. D.C. 177, 179, 363 F.2d 306, 308 (1966). Thus, in the present case, the absence of the co-defendant from the trial following a critical in-court identification by Miss Lucas, before any cross-examination of Miss Lucas by defense counsel which might have raised questions in the jury's mind concerning her identification of the co-defendant, had the inevitable result of giving unwarranted credibility of Miss Lucas'

companion identification of appellant. The prejudice resulting therefrom was so substantial as to require a mistrial. Kotteakos v. United States, 328 U.S. 750, 764 (1946).

V

THE COURT ERRED IN ALLOWING INTO EVIDENCE A SHOTGUN, WEARING APPAREL, SHOTGUN SHELLS AND TRAFFIC TICKETS

A. The Shotgun Was Admitted Improperly

Counts 1, 3, 4, 5, 6, 7 and 8 charged appellant with committing various crimes "with a dangerous weapon, that is, a pistol." D.C. Code § 22-3202 defines a "dangerous or deadly weapon" as inter alia a "pistol" or "shotgun." During the trial, the prosecution caused to be marked for identification and elicited testimony concerning two weapons. One of these weapons was a pistol and was referred to throughout the trial as a "pistol." The other was a shotgun and was referred to throughout the trial as a "shotgun." The shotgun was later admitted into evidence.

The effect of this admission into evidence of the shotgun, in conjunction with the lower court's instruction on "dangerous weapon," was to associate appellant with a weapon which the indictment did not charge was in his possession. The admission of the shotgun under these circumstances was erroneous. Macklin v. United States, 133 U.S. App. D.C. 347, 410 F.2d 1046 (1969).

B. The Lower Court Erred in Allowing into Evidence Items of Wearing Apparel which Were Connected Only with the Co-defendant

During the prosecution's case, several items of clothing found in or near the building where the co-defendant was apprehended, were marked for identification and subsequently introduced into evidence. No connection was ever made between these items and appellant. They were admitted into evidence on the ground that they tended to identify the co-defendant as one of two perpetrators of the robbery. However, these items were not needed for that purpose. The co-defendant was apprehended shortly after the crime and was identified at that time by at least two eye witnesses who also identified him at trial. These items of clothing gave the misleading appearance to the jury that the prosecution had significant tangible evidence linking appellant to the crime. Therefore, "whatever probative value this evidence had, it was outweighed by its prejudicial effect." United States v. Mullings, 364 F.2d 173, 176 (2d Cir. 1966); Davis v. United States, 133 U.S. App. D.C. 167, 409 F.2d 453 (1969).

C. The Lower Court Erred in Allowing into Evidence Shotgun Shells and Traffic Tickets Found in an Automobile near the Scene of the Crime

The lower court permitted the introduction into evidence of shotgun shells and traffic tickets found as the result of a warrantless search of an automobile near the scene of the robbery. The search

was not pursuant to any arrest, lawful or otherwise. The automobile was under police control at the time of the search. There was no danger that the car would be moved out of the locality or jurisdiction while the police obtained a warrant. Therefore, the search without a warrant was illegal and the evidence obtained inadmissible. Preston v. United States, 376 U.S. 364 (1964).

VI

A MISTRIAL SHOULD HAVE BEEN GRANTED DURING THE PROSECUTION'S CROSS-EXAMINATION OF MARGIE LEACH

Appellant's sister, Margie Leach, testified that appellant gave her his automobile in May, 1968; that she loaned it to a friend prior to June 8, 1968; and that she did not see it thereafter. During the cross-examination by the prosecution she admitted that she had learned subsequent to the robbery that the automobile was somehow involved in the police investigation. When asked if she had ever talked to any policeman after learning that the automobile was connected with the case, she answered affirmatively, indicating a conversation with a policeman whose name she could not recall. The prosecution then asked Detective Burwell to stand and challenged the witness' credibility because she had not specifically sought out Detective Burwell to communicate her knowledge concerning the automobile.

The jury knew that Detective Burwell was the officer responsible for the investigation of the robbery. There was no

reason Miss Leach should have such knowledge. Yet, by asking her whether she specifically sought out Detective Burwell -- and by having Detective Burwell stand while the question was asked -- the prosecution's attempt at impeachment was not only erroneous, but the error was so substantial that the prejudice could not be removed from the jury's mind. See Kotteakos v. United States, 328 U.S. 750, 764 (1946).

VII

THE COURT ERRED IN ITS INSTRUCTIONS ON ARMED ROBBERY AND ASSAULT WITH A DANGEROUS WEAPON

All counts of the indictment referring to a weapon contained the words "that is, a pistol." The court below refused appellant's request that its instructions include after its reference to a "dangerous weapon" the phrase, "that is, a pistol." Instead, the court below used the term "dangerous weapon" without modification. The lower court's later reference to a definition of the term "pistol" failed to direct the jury's attention to the fact that the only dangerous weapon which appellant was charged with using was a pistol.

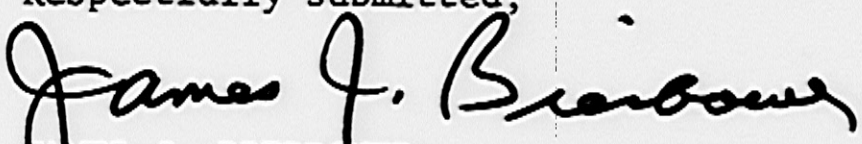
Appellant was entitled to a clear statement on each element of each defense. Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965). Each such instruction must follow a logical sequence. Elbel v. United States, 364 F.2d 127, 134 (10th Cir. 1966). Neither of these principles was followed with respect to the instructions here challenged. The inadequacy of the instructions requires a

reversal of the conviction and a remand for a new trial. Rule 52(b), Fed. R. Crim. P.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed, the appellant's conviction vacated and a new trial ordered.

Respectfully submitted,



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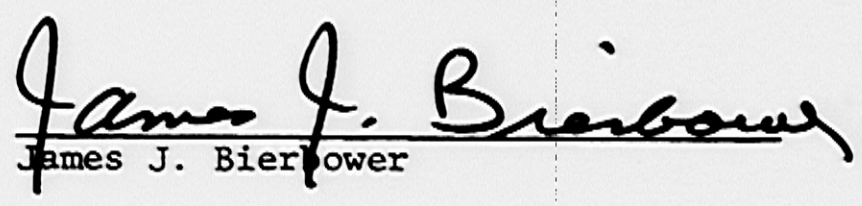
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was delivered to the office of the United States Attorney on February 2, 1971.



James J. Bierbower

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,969

UNITED STATES OF AMERICA, APPELLEE

v.

PAUL LEACH, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

Cr. No. 1304-68

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether a delay of less than one year between appellant's arrest and trial violated his Sixth Amendment right to a speedy trial.

II. Whether the trial judge erred in denying appellant's motions for mistrial based on:

(a) the fact that co-defendant White pleaded guilty, out of the presence of the jury, after the government called its third witness; and
(b) the prosecutor's cross-examination of appellant's sister.

III. Whether the trial judge erred in denying appellant's motions to suppress identifications based on:

(a) the fact that, of the seven photographs shown to the eyewitnesses, only two showed men with mustaches;
(b) the absence of counsel at two pre-arrest photographic identifications which occurred after suspicion had focused on the accused; and
(c) the absence of counsel when the prosecutor, just before the trial, showed to a witness the seven photographs from which that witness had previously identified appellant.

IV. Whether the trial court committed reversible error in admitting various items of evidence, either because they were illegally seized or because they were not relevant to the government's case against appellant.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,969

UNITED STATES OF AMERICA, APPELLEE

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PAUL LEACH, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on August 19, 1968, appellant, along with a co-defendant, Lester White, was charged in eight counts with armed robbery, robbery, assault with a dangerous weapon (five counts) and carrying a dangerous weapon. The case was tried before a jury, the Honorable Oliver Gasch presiding, on October 14, 15 and 16, 1969. Just after the trial began, co-defendant White pleaded guilty to robbery. The trial continued with respect to appellant, and at its conclusion he was found guilty as charged.[1] On January 20, 1970, appellant was sentenced

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[1] Count seven, charging an assault with a dangerous weapon (on Melvin Clark), was dismissed since no evidence on it was presented. (Tr. 538-540.)

to serve five to twenty years on count one, three to ten years on counts three through six,[2] and one year on count eight, the sentences to be served concurrently.[3] This appeal followed.

The Government's evidence established the following:

On June 8, 1968, Jack Pernatin was the owner and manager of the Crown Five and Ten, located at 318 Riggs Road, Northeast. His wife Marilyn was the cashier. About 7:00 p.m. Dianne Lucas and Victoria Sims, two sixteen-year-old students at Calvin Coolidge High School, entered the store. Miss Sims waited just inside the door while Miss Lucas went toward the rear to make a purchase. Then appellant and White entered. Appellant went to the rear of the store while White stayed at the door, and both men placed handkerchiefs over their faces. Appellant produced a pistol, grabbed Mr. Pernatin from behind, and told him this was a holdup. He struck Pernatin on the side of the head with his gun, handed him a dark vinyl case and told Pernatin to have the cashier, Mrs. Pernatin, put the money from the cash register into the case. Pernatin did as instructed, but appellant again struck him with the pistol and told him to lie on the floor. Then appellant started swinging the gun, cursing and ordering everyone else to lie down on the floor.

Meanwhile, Victoria Sims had seen appellant grab Mr. Pernatin. Seeing the look of fear on Pernatin's face, she realized what was happening and attempted to leave. White slammed the door, shoved a shotgun in her stomach and ordered her also to lie down on the floor. By this time Dianne Lucas was close to the door, and, like Victoria Sims, she did as ordered and lay on the floor.

The robbery lasted from five to ten minutes under lighting which was excellent. On leaving, the two men told

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[2] Having found appellant guilty of armed robbery, the jury did not consider the robbery count (count two) of the indictment.

[3] On January 23, 1970, co-defendant White was sentenced to serve two to eight years on the robbery charge to which he had pleaded guilty.

everyone to give them five minutes to get away (Tr. 157-160, 187-192, 348-352). As things turned out, however, no one in the store needed to report the robbery. An unidentified woman had seen what was happening, ran into the People's Drug Store just three doors away, and told Special Police Officer Joseph Dyson of the robbery in progress. Dyson told a clerk to notify the police and ran toward the Crown Five and Ten. Arriving, he dropped behind a parked car and kept the front door of the store under observation. Shortly thereafter, two masked men left the five and ten. Dyson, still hidden behind the parked car, ordered them to halt, but they fled. Dyson fired several shots at them and gave chase. His shots attracted the attention of Curtis Prince, who was employed as the security supervisor of the Giant Food Store at 300 Riggs Road. Prince came out of the Giant, looked toward the five and ten and saw Dyson chasing two men. He got into his car, pursued one of the fleeing men into an apartment building, and placed him under arrest. The man turned out to be the co-defendant White (Tr. 238-245). Appellant managed to escape.

By the time Prince had arrested White, Metropolitan Police Officer Calvin G. Wilson had arrived. White was taken back to the five and ten and was identified by three witnesses, including Victoria Sims (Tr. 46-47, 54, 77).[4] Near the store Wilson recovered a .410 gauge shotgun, in two parts, which resembled the one used by White.[5] The barrel, containing one live .410 gauge shotgun shell, was found lying in the parking lot next to the Crown store. The butt portion was recovered on the hillside behind the five and ten (Tr. 273).

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[4] Dianne Lucas testified that she recognized White when he was returned but that no one asked her if she could identify him (Tr. 91-92).

[5] The pistol which resembled the one used by appellant was recovered in the street by Dyson and turned over to Wilson (Tr. 241).

Sometime shortly after the offense, an unidentified woman in a red dress approached Special Officer Dyson and pointed out a 1961 Chevrolet parked near the Crown Five and Ten.[6] She told Dyson that the two robbers, just prior to the crime, had gotten out of that car and gone into the store (Tr. 282). Dyson communicated that information to Officer Wilson, who walked over to the car.[7] The windows were rolled down[8] and, looking in, Wilson observed a plainly marked box of .410 gauge Winchester shotgun shells[9] on the floor in front of the passenger seat. He also saw two traffic tickets[10] on the dash in front of the driver's seat. Wilson seized both the box of shotgun shells and the traffic tickets (Tr. 267-277, 282-288, 342-344). The .410 shotgun shells, of course, fit the .410 shotgun which was recovered near the scene and was identified as resembling the shotgun used in the robbery. One of the traffic tickets was for a moving violation committed on May 7, 1968, by Paul Andre Anderson, while driving a 1961 Chevrolet bearing temporary Maryland tag number 205050. It was stipulated that Paul Andre Anderson and appellant were one and the same person and that on May 1, 1968, Maryland temporary tags 205050 were issued to Paul Andre Anderson (Tr. 266-288, 341-346). The Chevrolet in which the tickets and shotgun shells were found bore temporary Maryland tags 205050.

At the conclusion of the Government's case, the trial court denied appellant's motion for judgment of acquittal (Tr. 371-373).

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[6] It is unclear whether this woman was the same woman who had originally told Dyson that the robbery was in progress.

[7] It is not clear whether this happened before or after the shotgun was recovered, but the sequence of the testimony indicates that the gun had been found before Wilson was told of the car.

[8] Wilson also believed that the keys were in the ignition (Tr. 287).

[9] See Government Exhibit 15, which is part of the record on appeal.

[10] Government Exhibits 16 and 17, which are part of the record on appeal.

The defense was alibi. Appellant's aunt and uncle claimed that he was in Buffalo, New York, from the end of May to about the second week in September. They both remembered specifically that on June 8, the day of the crime, he was in their house at 9:00 p.m. (Tr. 379-400). Appellant's sister, Margie Leach, testified that just prior to leaving for Buffalo appellant had given her the Chevrolet which was found near the five and ten. Later in May, she said, she lent it for one night to a man who had been her boy friend since 1964. She said she never saw the car again. Moreover, she saw her boy friend only once more, some weeks afterwards, and she did not think to ask him what had become of the car (Tr. 400-415).

Appellant testified that he had gone to Buffalo in May and did not at any time return to the District until August (Tr. 416-432). He denied committing the robbery and three times denied that he knew Lester White (Tr. 417, 422, 432). In rebuttal the Government established that on May 21, 1968, appellant was arrested with Lester White for disorderly conduct and that, after the two arrived at the precinct, they were seen talking together during the booking process (Tr. 451-458).

ARGUMENT

I. A delay of less than one year between arrest and trial cannot support appellant's claim that he was denied a speedy trial where that delay was not attributable to the Government.

(Tr. 12, 41-7, 422-432, 437-454, 457-458)

Appellant argues that an eleven-month delay between his arrest and trial constituted a violation of the Sixth Amendment. In so arguing, appellant relies on two cases, the first of which is *McNeill* v. *United States*.[11] There this Court found that a *twenty-eight month* delay between arrest and trial was the result either of "gross negligence or a callous indifference" to the Sixth Amendment rights

[11] D.C. Cir. No. 21,570, decided June 4, 1968 (unpublished).

of a continuously incarcerated defendant.[12] In the instant case, however, the delay was less than one year. The Government never requested a continuance and for at least two months prior to trial had actively sought a trial date (Tr. 12). The entire post-arrest delay appears to be chargeable to the time necessary to process defense motions in an orderly way[13] and to the congested docket of the District Court (Tr. 10-11).[14] Under these circumstances there can be no dismissal of the indictment absent a showing of actual prejudice. Despite appellant's contrary contention, the second case cited by him, *(George) Smith* v. *United States*,[15] unequivocally supports the Government's position. In *Smith* this Court held that in the context of the present strain on prosecutorial and judicial resources, a thirteen-month delay between arrest and trial was, in the absence of prejudice, insufficient to justify dismissal of the indictment, even though the defendants were incarcerated for the entire period and the Government offered absolutely no explanation for the delay.[16]

Appellant now argues that his defense at trial was prejudiced because his "principal" witnesses were subject to an attack on the ground that they would have difficulty remembering precisely what occurred over a year before the trial. That not only is entirely speculative but is an obvious afterthought, for in moving to dismiss the indictment appellant's counsel at trial (who is also his coun-

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[12] *Id.* at 2.

[13] *(Raymond) Smith* v. *United States*, 118 U.S. App. D.C. 38, 43, 331 F.2d 784, 789 (1964) *(en banc)*. We note that at the time this case was processed no case could be certified ready for trial while any defense motion was outstanding.

[14] Similarly, the lapse of time between the crime on June 8 and appellant's arrest on October 17 was not ascribable to the Government.

[15] 135 U.S. App. D.C. 284, 418 F.2d 1120 (1969).

[16] *See also Hedgepeth* v. *United States*, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966), in which this Court affirmed a conviction despite a delay of fourteen months between the indictment and trial of a continuously incarcerated defendant.

sel on appeal) "did not make any claim that the delay had impaired appellant's ability to answer the charge." [17] Moreover, appellant cannot show that his witnesses would not have been subject to the same attack had the trial occurred even six months earlier.[18] In any event, the Government witnesses were in the same position. Indeed, the Government's burden was aggravated by its obligation to prove appellant's guilt beyond a reasonable doubt.[19] The real problems with the testimony of appellant's witnesses were that: (1) every witness was a close relative; (2) the story told by appellant's sister about the disposition of the 1961 Chevrolet which appellant owned was inherently incredible; [20] and (3) appellant's own credibility was destroyed when the Government proved in rebuttal that he was not telling the truth when he consistently and unequivocally denied knowing his co-defendant White (compare Tr. 417, 422, 432 with Tr. 437-454, 457-458).[21] In sum, appellant's belated claim of prejudice is more imaginary than real and cannot provide a predicate for reversal in this case.

II. Appellant's two motions for mistrial were properly denied by the trial judge.

(Tr. 195-211, 221-222, 411-415)

After the direct testimony of the Government's third witness, the co-defendant White elected to plead guilty. Though the Government originally demanded a plea to both robbery and one count of assault with a dangerous

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[17] *Hedgepeth* v. *United States*, *supra* note 16, 125 U.S. App. D.C. at 22, 365 F.2d at 955. The motion to dismiss for lack of a speedy trial was filed in the District Court on October 1, 1969, and argued and denied on October 13 (Tr. 6-12).

[18] *Id.*

[19] *United States* v. *Ewell*, 383 U.S. 116, 122-123 (1966).

[20] See p. 5, *supra*.

[21] The jury could also have found it hard to believe that from May to August 1968 appellant never returned to the city to see the woman whom he married upon his return (Tr. 427-430).

weapon, it agreed, after much persuasion, to accept a plea to robbery only. White pleaded guilty to that charge in the absence of the jury (Tr. 195-211). At that point appellant's counsel moved for a mistrial. The trial judge instead proposed, at the suggestion of the prosecutor and on the authority of *Scott* v. *United States*,[22] to instruct the jury that they were not to speculate as to the absence of White (Tr. 212-221). There followed this colloquy between the court and appellant's counsel:

> THE COURT: Do you agree this footnote [in *Scott*] controls?
>
> [COUNSEL]: It is certainly difficult to distinguish it.
>
> THE COURT: All right, I will follow the same procedure that Judge Bazelon approved of. (Tr. 221-222.)

The jury was then instructed in precisely the same language approved in *Scott*.[23]

Appellant now argues that the court's failure to grant his motion for a mistrial was reversible error. Our response is threefold. First the colloquy set out above, occurring after the trial judge had given appellant's counsel an opportunity to read the *Scott* case, demonstrates that counsel ultimately acquiesced in the ruling of the trial judge and thereby failed to preserve the point for appellate review.[24] Second, appellant's belated attempt to distinguish the *Scott* case is less than persuasive. While it is true that in *Scott* the appellant admitted that he was at the scene of the crime, this Court did not even imply that had that not been the case a mistrial would have been required. Third and finally, appellant cites not a single case to support the position he now espouses. In fact, the federal courts have consistently ruled that a

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[22] 135 U.S. App. D.C. 377, 378 n.1, 419 F.2d 264, 265 n.1 (1969).

[23] "You must not conjecture, speculate, guess or surmise why the other defendant is not before you at this time" (Tr. 223).

[24] *Cf. Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

trial court does not commit error even by *informing* the jury that one or more defendants have pleaded guilty during trial so long as proper cautionary instructions are given.[25] Recently the Sixth Circuit refused to reverse where a co-defendant pleaded guilty *before* the jury and *no* cautionary instruction was given.[26] Since the course of action mandated by *Scott* and followed in this case is far better adapted to eliminate any prejudice which might accrue to remaining defendants, it cannot, *a fortiori*, provide a predicate for reversal here.[27]

Appellant's second request for a mistrial concerned the prosecutor's cross-examination of appellant's sister. After she testified that she knew appellant was charged with robbery, the prosecutor asked her if she had reported the story concerning her automobile to Detective Burwell. Before the witness could answer, appellant's counsel objected, explaining at the bench that Miss Leach could not have known who was conducting the investigation. The court indicated agreement, and the prosecutor immediately offered to rephrase the question. The court then denied appellant's request for a mistrial, and Miss Leach was asked if she ever told *any* police officer that her car had been in her boy friend's possession on June 8. She answered that question in the affirmative (Tr. 411-415).

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[25] *United States* v. *Crosby*, 294 F.2d 928, 948 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962); *see United States* v. *Restaino*, 369 F.2d 544, 545 (3d Cir. 1966); *United States* v. *Edwards*, 366 F.2d 853, 870 (2d Cir.), *cert. denied*, 386 U.S. 919 (1966); *United States* v. *Aronson*, 319 F.2d 48, 52 (2d Cir.), *cert. denied*, 375 U.S. 920 (1963).

[26] *United States* v. *Kimbrew*, 380 F.2d 538, 540 (6th Cir. 1967).

[27] *See also United States* v. *Harris*, —— U.S. App. D.C. ——, ——, 437 F.2d 686, 691-692 (1970). *United States* v. *Thompson*, D.C. Cir. No. 22,679, decided May 8, 1970 (unpublished). Two cases in this jurisdiction produced reversals because a jury was *informed* of a guilty plea, but in both cases the plea was taken *before* the jury, and in neither case was a cautionary instruction given. *Gaynor* v. *United States*, 101 U.S. App. D.C. 177, 247 F.2d 583 (1957); *Payton* v. *United States*, 96 U.S. App. D.C. 1, 222 F.2d 794 (1955).

Appellant now claims that the prosecutor's question (and his request that Detective Burwell stand so that Miss Leach would know who he was) constituted reversible error even though Miss Leach was not permitted to answer the question and even though she ultimately said she did report the matter to the police. There is simply no basis in law or in common sense for such an argument.

III. The trial judge correctly refused to suppress the pre-trial photographic identifications made by the witnesses Lucas or Sims.

(Tr. 19, 26, 33-34, 37-43, 55-56, 71, 79, 86-87, 89, 91-92, 103, 126-128, 134, 180, 192, 251-253, 258, 261-264, 350-364)

On July 31, 1968, Detectives Howard Burwell and Melvyn Lucas went to the homes of Victoria Sims and Dianne Lucas.[28] To each young lady they showed a group of seven photographs and asked if the girls could identify anyone in that group as one of the robbers.[29] All the photographs were black and white police "mug shots" depicting front and profile views of young Negro males of varying complexions. All of them had short haircuts, and two had mustaches.[30] Without any suggestion or prompting by the officers,[31] both Miss Sims and Miss Lucas independently and positively identified appellant from his photograph as one of the two robbers (Tr. 37-41; *cf.* Tr. 126-128, 192, 253, 262, 351). Appellant now argues that

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[28] Miss Lucas and Detective Lucas are not related.

[29] Detective Burwell could remember only five of the seven photographs introduced as Defense Exhibits 2 through 8 (and part of the record on appeal). He was sure, however, that he showed seven photos and that he turned seven over to the prosecutor. Nothing in the record even suggests that any of the seven photographs shown were later replaced by other photographs prior to the suppression hearing (Tr. 26, 42-43, 56, 71, 79, 89, 258, 263-264).

[30] See the trial judge's description of them at Tr. 48-49, as well as the photographs themselves, which are included in the record on appeal.

[31] Tr. 19, 33-34, 37-41, 55-56, 86-87; *cf.* Tr. 251-253, 261, 264.

the array shown to the witnesses was impermissibly suggestive because, and only because, just two men in the photographs had mustaches.

That the presence or absence of mustaches in the photographs shown prompted the identification by either witness is flatly contradicted by the record. Miss Sims said that she had never seen the lower part of appellant's face because, while she looked at him, it remained covered with a handkerchief which came up to his nose.[32] Since she could not see whether that robber did or did not have a mustache, she could hardly have been influenced by the presence or absence of a mustache on the men in the seven photographs (Tr. 350-364). Miss Lucas, on the other hand, did see appellant's full face and therefore his mustache (Tr. 91-92),[33] but she specifically rejected the idea that her identification was based on the mustache (Tr. 103).

Appellant cites no cases which support his unique theory that a defendant with a mustache has a Fifth Amendment right which prevents the police from showing photographs to witnesses unless a large percentage of those photographs are of similar looking individuals who have mustaches. Not surprisingly, the law is clearly to the contrary.[34] The same argument made here was advanced in the District Court and was emphatically rejected (Tr. 134). That decision is clearly supported by the record and the case law.

Alternatively, appellant argues that since "the police investigation had 'focused' on him" at the time of the pre-

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[32] Miss Sims was, however, still able to observe the shape of his face, as well as his hair, complexion and height. Most importantly, she noticed that he *looked like her cousin*, and ultimately that was the fact which enabled her to make her later identification (Tr. 180, 350, 351, 358, 363).

[33] She observed his face for about two minutes under "very bright" light before he pulled up the handkerchief and announced the robbery (Tr. 229).

[34] *Simmons* v. *United States*, 390 U.S. 377 (1968); *Sutton* v. *United States*, —— U.S. App. D.C. ——, 434 F.2d 462 (1970); *cf. Biggers* v. *Tennessee*, 390 U.S. 404 (1968).

arrest photographic identifications, he had a right to be represented by counsel at those proceedings even though he had not even been arrested. The problem with that argument is that it was explicitly raised and specifically rejected in *United States* v. *Kirby*, 138 U.S. App. D.C. 340, 342 n.2, 427 F.2d 610, 612 n.2 (1970). Since *Kirby* there has been no expansion of the *Wade* [35] rule in this Circuit to apply to photographic identifications.[36]

Appellant's final contention is that, in any event, it was improper for the prosecutor, in the absence of defense counsel, to show to Dianne Lucas on the day of trial the seven photographs from which she had originally identified appellant. The thrust of appellant's argument is that this was an identification proceeding which occurred long after indictment and appointment of counsel, and that therefore *Wade* required the presence of defense counsel. We disagree for two reasons. In the first place, this was not an *identification* proceeding. Miss Lucas had previously identified appellant from these same seven photos, and the prosecutor's actions can only be viewed as refreshing the recollection of a witness prior to trial.[37] In the second place, a photographic identification is not a "confrontation" within the meaning of *Wade*, and the Sixth Amendment is therefore inapplicable to such a proceeding.[38] Since the photographic identifications were admissible there was, of course, no reason to exclude the witnesses' in-court identifications.

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[35] *United States* v. *Wade*, 388 U.S. 218 (1967).

[36] In fact, this and other circuits have consistently rejected the existence of any right to counsel at photographic identifications conducted even after arrest. *See, e.g., United States* v. *Brown*, D.C. Cir. No. 24,452, decided March 15, 1971 (opinions to follow); *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *Allen* v. *Rhay*, 431 F.2d 1160 (9th Cir. 1970); *McGee* v. *United States*, 402 F.2d 434 (10th Cir. 1968).

[37] The record is unclear as to whether or not Miss Lucas even made an identification at that time (Tr. 97-98, 102-104). What is clear is that the viewing was in no way suggestive (Tr. 101).

[38] See cases cited *supra* note 36.

IV. The trial judge did not err in admitting into evidence, over appellant's objection, various items of evidence.

(Tr. 97-98, 101-104)

Appellant argues that the shotgun, shotgun shells, and traffic tickets should not have been received in evidence. We reject these contentions *seriatim.*[39]

Appellant objects to the admission of the shotgun on grounds of relevance because the indictment only charged appellant with *personally* carrying a pistol. The two men who robbed the store, however, acted in concert, and appellant was therefore an aider and abettor with respect to the acts of co-defendant White. The jury was so charged, and appellant did not then object. That ends the matter.[40] The connection between that gun and the shotgun shells which fit it needs no discussion; and the traffic tickets, of course, together with records of the motor vehicle departments of the District of Columbia and Montgomery County, tie appellant to the car, the shotgun shells and the scene of the crime. In this connection appellant argues that "the search [of the car] without a warrant was illegal" (Br. 26). The simple answer to that contention is that there was no search since the items in question were in plain view.[41] Admittedly these items were not subject to seizure as contraband. The police, however, were investigating a robbery which had just occurred. The car in which these items were seen was the same car

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[39] Appellant also argues that items of clothing apparently belonging to co-defendant White should not have been admitted. Even if appellant's contention were correct, which we submit it clearly is not, these relatively innocuous items scarcely could have prejudiced appellant to an extent mandating reversal.

[40] *Sutton* v. *United States*, *supra* note 34. Moreover, given the joint venture involved here, appellant's final argument (Br. 27-28), that he could have been found guilty only of an assault with a pistol and not a shotgun, borders on the frivolous. *Id.*

[41] *Harris* v. *United States*, 390 U.S. 234, 236 (1968); *Rios* v. *United States*, 364 U.S. 253, 262 (1962).

used by the robbers just prior to the robbery.[42] There was thus probable cause to believe that both the shotgun shells and the tickets were "evidence" connected with the crime.[43] In particular, since one of the two robbers had just escaped, it was particularly imperative that the traffic tickets be checked in the reasonable hope that they would lead, as in fact they did, to the identification of the escaped felon. We respectfully submit that if, under these circumstances, Officer Wilson had refused to seize the evidence, he would have been derelict in his duty.[44]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

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[42] The police, of course, had a right to rely on the report to Dyson made by the citizen eyewitness. *Daniels* v. *United States*, 129 U.S. App. D.C. 250, 393 F.2d 359 (1968).

[43] *Warden* v. *Hayden*, 387 U.S. 294 (1967).

[44] Compare the facts justifying a full search in *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

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